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Supreme Court of the United States

OCTOBER TERM, 19.....

PAULINE A. SELSER ET AL., PETITIONERS,

VS.

CITY OF STUART ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable the Supreme Court of the United States:

Pauline A. Selser and others named in the bill of complaint filed in said cause respectively petitioning show to the court as follows:

STATEMENT OF MATTERS INVOLVED.

This petition seeks a review of the decision now reported as *Selser et al.* v. *City of Stuart et al.*, 135 F. 2d 211.

Petitioners filed in the United States District Court for the Southern District of Florida their bill of complaint for declaratory judgment against the City of Stuart and Supreme Forest Woodmen Circle for the purpose of securing a determination that the properties of petitioners described in the bill of complaint were not subject to any further taxation by the City of Stuart nor liable for taxes previously levied.

The bill set forth the history of the City of Stuart as related to the properties of the petitioners—complainants

below—and among other things showed that by Chapter 7415, Special Acts of Florida 1915, the defendant municipality came into existence and by that Act its boundaries were defined and power to levy taxes given. Afterwards, in 1925, the Florida Legislature passed Chapter 11214 and thereby in violation of Article VIII, Section 8, of the Florida Constitution, attempted to extend the corporate limits of said city and vest said city with corporate powers including the powers of taxation over the additional territory, including the properties of petitioners. That the said city never performed any of its municipal functions in the way of constructing sewers, sidewalks or utilities or in the furnishing of police protection in the area defined by said Act of 1925.

That in November, 1925, at an extraordinary session of the Florida Legislature a further Act was passed, namely, Chapter 11750, attempting to further extend the boundaries of said city. That the constitutionality of both of said Acts was challenged in a quo warranto proceeding which went before the Supreme Court of Florida in the case of *State ex rel. Davis* v. *City of Stuart*, 97 Fla. 69, 120 So. 335, and the Supreme Court of Florida there held that both of said Acts were unconstitutional and that the additional territories attempted to be added to the City of Stuart, including the lands of petitioners, were never effectively included within the boundaries of said city. That during the interval between the passage of said Act and the said decision of the Supreme Court of Florida rendered January 30th, 1929, the said municipality issued and sold a large amount of municipal bonds and incurred other indebtedness for improvements within its original limits, but no money was spent in the outlying territory described in said Special Acts of 1925, where petitioners' lands were situated and the municipality furnished no public utilities and no benefits to such outlying territories. It is further shown that the municipality afterwards secured the passage at subsequent sessions of the Legislature of other special or local bills purporting to decrease the

limits of said municipality but without bringing the limits back to the original limits described in the Act of 1915 in conformity with the decision of the Supreme Court of Florida as aforesaid. That such later Acts by the decreased limits still left certain lands purportedly within the jurisdiction of said city but outside of the constitutional limits as defined by said decision. That regardless of said quo warranto judgment the officers of said city continued to make debt service levies for the bonds issued as aforesaid upon lands which had been excluded from the corporate limits of said city by said decision. That said city caused still further local acts of the Legislature to be passed purporting to validate the levies of taxes and liens supposedly created therefor upon territory, including the lands of the plaintiffs lying outside of the constitutional boundaries as defined by said Supreme Court decision, whereas all such attempted validation acts were void because the Legislature could not validate that which it could not constitutionally authorize in the first instance. That on account of the conflict between said Supreme Court decision and said special acts the Tax Assessor and Tax Collector of said city admitted that they did not know what lands were lawfully liable for taxes to pay the outstanding bonds of said municipality and no steps were taken to enforce such levies against the lands adjudged by the Supreme Court of Florida to have been illegally included within said municipality.

The bill for declaratory judgment named the Supreme Forest Woodmen Circle as a co-defendant to the end that the suit might be in effect a spurious class action. The Woodmen Circle was a large bond creditor and claimed that the municipality had the right to levy and enforce taxes in the areas outside of the legal limits as defined by the Supreme Court decision. Therefore as such creditor it was in a position to make defense on behalf of all creditors similarly situated. That creditor was duly served but failed to defend. Whereupon petitioners amended their bill and made American Surety Company,

another similar creditor, a class defendant. That creditor refused to defend. Whereupon it was dropped as a defendant and with the court's permission Thomas M. Cook was made a defendant to defend for bond creditors for the reason that since the institution of this declaratory judgment suit he, Cook, together with the municipality had filed a petition on the bankruptcy side of the said district court to obtain a composition of the indebtedness of said city, he, Cook, claiming to represent 62% of the creditors. Service was made on Cook and he and the municipality filed their motions to dismiss (pages 18 and 19 of the Record). At the hearing on the motions of the defendants it was contended that the bill was in effect one to restrain municipal taxation and was a collateral attack upon its existence. Neither ground was tenable because no injunction was prayed for and because no attack was made upon the corporate existence of the city with respect to its original and constitutional territory. Furthermore the Supreme Court of Florida in the case above mentioned had already directed the entry of a judgment of ouster as applied to the territory sought to be added by the unconstitutional Acts of 1925. The trial court in these suits adopted the construction of the bill as amended which was insisted upon by the defendant municipality and the defendant Cook and sustained the motions to dismiss. Petition for rehearing was sought and denied. Following final judgment appeal was entered as now appears page 26 of the Record.

The petitioners appealed to the Circuit Court of Appeals and that court affirmed the decision of the court below as now appears by the report of the case as *Selser et al.* v. *City of Stuart*, 135 F. 2d 211.

In the meantime the plan of composition proposed by the City of Stuart and consented to by said Thomas M. Cook, alleged fiscal agent and alleged representative of 62% of the creditors, was approved by the said court and on appeal was lately affirmed by the Court of Appeals as now reported as *Green* v. *City of Stuart*, 135 F. 2d 33.

Petition for certiorari has been filed and will be presented in that case along with this petition. As appears by the record in the Green case the petitioners in this Selser case moved the court to have this declaratory judgment suit consolidated with said petition of the City of Stuart for composition, all to the end that the court might properly determine the proper base of ability to pay in considering and passing upon the fairness of the proposed plan of composition, but that motion to consolidate was denied.

So it is that the petitioners here had a double right and reason for prosecuting the declaratory judgment suit. First, tc secure an authoritative determination in confirmation of the decision by the Supreme Court of Florida above cited to the effect that their lands within the excluded areas were not subject to taxation, past or future, and second, that in considering and determining the fairness of a plan of composition for the City of Stuart, the court sitting in bankruptcy would determine that taxes against their lands should not be taken into consideration as available assets to the City of Stuart in meeting its new obligations to be approved under the new composition plan. If plaintiffs had remained silent during such proceedings then takers of refunding bonds, issued pursuant to the refunding plan, would have claimed estoppel against the plaintiffs.

BASIS OF JURISDICTION.

Jurisdiction in the district court was predicated upon 28 U. S. C. A., Sec. 400, and Rule 57 of Rules of Civil Procedure. Also upon diversity of citizenship, all as appears by the bill of complaint now part of the Record. The decision and judgment of the Court of Appeals in this cause was rendered April 29th, 1943, but petition for rehearing was filed and denied on June 1st, 1943, as now appears by the Record. Therefore the filing of this petition is in due time. The basis of this court's jurisdiction is Sec. 240, Judicial Code, Sec. 347, Title 28, U. S. C. A.

QUESTIONS PRESENTED.

1st Question.

Could the trial court properly adopt the defendant's construction of the complaint and find it was a bill for injunction when no such relief was asked?

2nd Question.

Could the trial court deprive the petitioners of the right to have the status of their lands adjudicated when the amended complaint alleged ownership and a dispute within the purview of 28 U. S. C. A., Sec. 400, and within the purview of Section 1038, Compiled General Laws of Florida?

3rd Question.

Did the courts below err in holding that this suit was a collateral attack on the city's existence when that existence as defined by Chapter 7415, Laws of Florida, 1915, was conceded by the bill?

4th Question.

Does the amendment to the declaratory judgment act, now 28 U. S. C. A., Sec. 400, Pocket Supplement, preclude a determination that certain lands excluded by ouster judgment of the Supreme Court of Florida could not effectively be brought in again by subsequent invalid Legislative acts attempting to validate void taxes?

5th Question.

Could the trial court dismiss Thomas M. Cook as a proper party defendant to represent the rights of himself and other bondholders when he had been made a class defendant after the City of Stuart filed a bankruptcy pe-

tition for composition and it appeared that he claimed to own 62% of its bonds?

6th Question.

Could the defendants by the later filing of a bankruptcy petition destroy the right of petitioners to have these questions determined when they as taxpayers were not allowed to intervene in the bankruptcy proceeding?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

I. The Decisions of the Courts Below Are Contrary to the Decisions of the Supreme Court of Florida in Like Cases Where There Had Been a Previous Ouster by Quo Warranto Proceedings or Where Statutes Purporting to Give Power of Taxation in Certain Territory Had Previously Been Declared Void.

See *City of Winter Haven* v. *Klemm*, 141 Fla. 75, 192 So. 646. *State ex rel. Davis* v. *City of Stuart*, 97 Fla. 69, 120 So. 335, 64 A. L. R. 1307. *New Smyrna Inlet Dist.* v. *Esch*, 103 Fla. 24, 137 So. 1. *Municipal B. & M. Corp.* v. *Bishop's Harbor D. Dist.*, 133 Fla. 430, 182 So. 794. *Town of Eagle Lake* v. *Adams*, 146 Fla. 165, 200 So. 367. The New Smyrna Inlet District case is particularly applicable here because of the sundry abortive efforts of the Legislature to validate unconstitutional taxation by the Inlet District. In these and in many other cases the Supreme Court of Florida has not hesitated to give equitable relief for the protection of property owners pursuant to the due process and equal protection clauses of the state and federal constitutions and pursuant to the express power given to chancery courts in Florida under what is now Section 1038, Compiled General Laws, reading in part as follows:

> "The courts of chancery in this State shall have jurisdiction in all cases involving the legality of any tax, assessment or toll, and shall inquire into and determine the legality, equality and validity of the same under the Constitution and laws of the State of Florida, and shall render decrees setting aside such tax, assessment or toll, or any part of the same, that shall appear to be contrary to law."

This statutory provision was designed to give the same sort of relief in tax matters as is comprehended by 28 U. S. C. A., Section 400.

II. The Decisions of the Courts Below Denying Relief by Way of Declaratory Judgment Are in Conflict with the Decisions of This Court in Ocean Beach Heights v. Brown-Crummer Investment Company, 302 U. S. 614, 82 L. Ed. 478, and N. C. & St. L. Railway v. Walters, 294 U. S. 405, 79 L. Ed. 949, and N. C. & St. L. Ry. v. Wallace, 288 U. S. 249, 87 A. L. R. 1191.

In the instant case the Supreme Court of Florida had, as in the New Smyrna Inlet case, already rendered a decision, to-wit, in the case of *State ex rel. Davis* v. *Stuart, supra,* determining that the lands of petitioners were never constitutionally a part of the City of Stuart. The same situation existed with respect to the east side of Biscayne Bay in the Ocean Beach Heights case. Therefore the bill did not constitute any attack upon the corporate existence of the City of Stuart nor was it a collateral attack. It amounted to no more than what happened in the New Smyrna Inlet case. The prayer here was for a *judicial declaration of a status that had already been determined by the highest judicial authority of the State. The necessity for such declaration of status was brought about by the subsequent abortive Legislative acts passed for the City of Stuart the same as for the New Smyrna Inlet District.* The Walters case holds that the invalidity of such state acts may be determined by a declaratory decree.

III. The Decisions of the Courts Below Are Contrary to the Late Decision of This Court in the Case of Kelley v. Everglades Drainage District Decided June 1st, 1943, and Now Reported 87 L. Ed. (Adv.), Page 1091, and American United Mut. L. Ins. Co. v. Avon Park, 311 U. S. 138, 85 L. Ed. 91, 136 A. L. R., Page 60.

It appears by the record in this case and by the record in the companion case of *Green* v. *City of Stuart* that a petition for confirmation of a plan of composition of debts was filed in said district court by the city while this suit was pending and that the bill in this case was then amended making the majority creditor in that proceeding a party defendant in this proceeding to the end that such creditor might act as representative for all creditors of the City of Stuart when the court was considering and determining the status of petitioners' lands. It was not possible for the court in that bankruptcy proceeding relating to the City of Stuart to determine whether the proposed plan of composition was fair and equitable either to creditors or to property owners until it was determined whether the lands of these petitioners and others situated in territory excluded by the Supreme Court of Florida still constituted property against which taxes could be levied for the purpose of liquidating obligations recognized under such plan of composition. The issues presented in this cause were comparatively simple. They were based upon records and presented primarily questions of law. Their determination by the processes applicable to declaratory judgment suits would not only have given relief the petitioners were entitled to but the decree would have been of great aid and assistance to what the district court was being called upon to adjudicate in the bankruptcy proceeding instituted by the City of Stuart.

In the *Avon Park case*, 311 U. S., text 149, 85 L. Ed., text 97-98, this court quoted 11 U. S. C. A., Sec. 403(e)(6), and then said:

> "Plainly that finding could not be made if it was clear, for example, that a taxpayer could enjoin the issuance of the new bonds or the levy of assessments therefor."

The bill at bar clearly makes out a case for injunction under state law and federal law when tested by state decisions cited page 8 *supra*. For like reason the petitioners here were entitled to a declaratory decree under 28 U. S. C. A., Sec. 400.

The matters aforesaid more clearly and fully appear by Transcript of Record duly certified by the Clerk of the United States Circuit Court of Appeals, copies of which Record accompany this petition.

Wherefore petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be named therein a full and complete transcript of the record and proceedings (if the transcript already filed be deemed insufficient in that behalf) in the case entitled Pauline Selser *et al.*, Appellants, versus City of Stuart *et al.*, Appellees, and that the judgment and decree of said Circuit Court of Appeals in the said cause be reversed by this court and that the petitioners have such other and further relief in the premises as to this court may seem meet.

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